

IV. ARGUMENT

Respondent's Motion for Judgment on the Pleadings (Motion) alleges failure to state a claim upon which relief may be granted on statute of limitations grounds. Resp't Mot. ¶ 7; Resp't Memorandum at 3-5. EPA properly pleaded its case by stating a claim upon which relief may be granted, and the Agency has timely filed its Complaint under the applicable statute of limitations. As discussed below, the general federal five-year statute of limitations at 28 U.S.C. § 2462 applies to administrative actions under TSCA section 8(e). This statute of limitations provides that a claim must be commenced within five years of the date when the claim "first accrued." Respondent's allegation that EPA filed its Complaint after the running of the applicable statute of limitation turns on the question of when EPA's TSCA section 8(e) claim "first accrued" under the applicable statute of limitations at 28 U.S.C. § 2462.

In arguing that EPA filed the Complaint after the running of the statute of limitations, Respondent relies on a flawed analysis of the operation of the statute of limitations for a TSCA section 8(e) claim. Respondent incorrectly argues that the "general rule of accrual" applies to determine when the claim first accrued under 28 U.S.C. § 2462. Resp't Mot. ¶¶ 6, 7; Resp't Memorandum at 4-6. This leads Respondent to ineluctably and wrongly conclude that the date EPA's claim first accrued was the very same day that Respondent first obtained the Modern Four Plant Report (Modern Report) in 2002.⁵ This conclusion ignores the fact that a TSCA section 8(e) violation is a continuing one, and therefore the general rule of accrual does not apply for determining when a claim first accrued under 28 U.S.C. § 2462. For continuing violations,

⁵ In its Memorandum of Law in Support of Respondent's Motion for Judgment on the Pleadings (Respondent's Memorandum), Respondent also relies upon the 3M Co. holding that the discovery of violation rule does not apply for determining when a claim first accrues for statute of limitations purposes under TSCA section 5. Resp't Memorandum at 4. EPA notes that the Agency does not argue that the discovery of violation rule applies in the instant case. Rather, it is EPA's position that TSCA section 8(e) imposes a continuing statutory reporting duty, and therefore the doctrine of continuing violation applies for determining when a claim first accrued under the general federal five-year statute of limitations. As noted by the EAB in several subsequent decisions discussed later in this Memorandum, while the United States Court of Appeals for the District of Columbia Circuit expressed doubt in dicta in a footnote about the Administrative Law Judge's discussion that a TSCA section 5 violation could be continuing, the court neither analyzed nor decided the issue.

pursuant to the “special rule of accrual” known as the doctrine of continuing violations, a claim first accrues under 28 U.S.C. § 2462 on the last day of the violative act. In the instant case, Respondent’s violation continued each consecutive day from October 8, 2002 through November 17, 2008 and, consequently, EPA’s claim first accrued on November 17, 2008. As the EAB has noted, where a violation is continuing, “the date when a violation first accrues under the general five-year statute of limitations is not to be confused with the date when the violation first occurs.”⁶ In short, Respondent’s argument contravenes Environmental Appeals Board (EAB or the Board) case law, and should be squarely rejected.

In applying the EAB’s well-established test for determining whether a violation is continuing, it is clear that a TSCA section 8(e) violation is continuing in nature. In In re Harmon Electronics, Inc., the EAB adopted a two-prong test for determining whether a particular violation is a continuing one for statute of limitations purposes.⁷ The EAB’s holdings are controlling with respect to the application of this test to the question of whether a violation is continuing.

Under the first prong of the EAB’s test, the Board looks to the general language of the statute and the legislative history to determine whether the statute contemplates continuing violations. Harmon, 7 E.A.D. at 22. The EAB has already twice concluded that Congress intended for continuing violations under TSCA. In re Lazarus, Inc., TSCA Appeal No. 95-2, 7 E.A.D. 318, 368 (EAB 1997) (citing 15 U.S.C. § 2615(a)(1)); In re Newell Recycling Co., Inc., TSCA Appeal No. 97-7, 8 E.A.D. 598, 615-16 (EAB 1999) (citing Lazarus), aff’d, Newell Recycling Co., Inc. v. EPA, 231 F.3d 204 (5th Cir. 2000). Under the second prong of the test, the EAB analyzes the specific violation alleged in the complaint to determine whether it is

⁶ In re Harmon Electronics, Inc., RCRA (3008) Appeal No. 94-4, 7 E.A.D. 1, 22 (EAB 1997), rev’d on other grounds, Harmon Indus., Inc. v. EPA, 19 F. Supp. 2d 988 (W.D. Mo. 1998), aff’d, Harmon Indus., Inc. v. EPA, 191 F.3d 894 (8th Cir. 1999).

⁷ See Id.

continuing in nature in light of the statutory language. Harmon, 7 E.A.D. at 23. A reading of the plain language of TSCA section 8(e), as supported by a review of the general provisions in TSCA, the statute's purpose and legislative history, Agency policy, and case law, undeniably supports the conclusion that a violation of section 8(e) continues from the day information is obtained by Respondent until the day Respondent informs the Administrator of the information. Therefore, TSCA section 8(e) is a continuing violation statutory provision.

In this case, Respondent's violative conduct began on October 8, 2002, when Respondent obtained and failed to immediately inform the Administrator of the Modern Report. Respondent's violative conduct continued until Respondent submitted the Modern Report to the Administrator on November 17, 2008. As a result, EPA's claim did not first accrue until Respondent's violation ended on November 17, 2008. Consequently, the statute of limitations for EPA's claim does not run until November 16, 2013,⁸ given the application of the doctrine of continuing violation to 28 U.S.C. § 2462, and therefore EPA's Complaint was timely filed.

In the remaining portion of Section IV.A., we examine the factual issues raised by Respondent's Motion. In particular, Section IV.A. scrutinizes the facts pertaining to the period of Respondent's non-compliance. In Section IV.B., we then consider the operation of the applicable statute of limitations under the doctrine of continuing violations and the impact of that doctrine in tolling the statute of limitations in the instant case.

A. EPA Has Properly Pleaded Its Case by Stating a Claim upon Which Relief May Be Granted.

Turning to the factual issues raised by Respondent's Motion and the defense of limitations, EPA has properly pleaded its case by stating a claim upon which relief may be

⁸ In its Memorandum, Respondent references tolling agreements signed between the parties. Resp't Memorandum at 5-6. These tolling agreements extend the November 16, 2013 date an additional 196 days until May 31, 2014.

granted.⁹ As noted above, the standard of review for a motion to dismiss, to which Respondent likens its Motion, provides that the allegations and facts are to be construed in the light most favorable to Complainant. In Re: Commercial Cartage Co., Inc., 5 E.A.D. 112, 117 (EAB 1994). Moreover, “statutes of limitations in the civil context are to be strictly construed in favor of the Government against repose.” Interamericas Investments LTD v. Bd. of Governors of the Fed. Reserve Sys., 111 F.3d 376, 382 (5th Cir. 1997) (citing Badaracco v. Commissioner of Internal Revenue, 464 U.S. 386 (1984)); E.I. DuPont De Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924).

This case involves two key dates that are central to an analysis of the operation of the statute of limitations: 1) the date Respondent obtained the Modern Report; and 2) the date Respondent submitted the Modern Report to the Administrator. In the Complaint, EPA alleges that Respondent’s TSCA section 8(e) violation began on October 8, 2002, when Dr. Joel Barnhart, the then-Vice President of Elementis Chromium, LP, received the Modern Report. Compl. ¶¶ 41-43; 49-52. Respondent admitted, in the Answer, to receiving the Modern Report on October 8, 2002. Answer ¶¶ 41-42. EPA further alleges in the Complaint that Respondent’s TSCA section 8(e) violation continued until Respondent submitted the Modern Report to the Administrator on November 17, 2008. Consequently, the beginning date of Respondent’s

⁹ Although Respondent limited the Motion for Judgment on the Pleadings to failure to state a claim upon which relief may be granted to the defense of limitations, EPA wishes to note that the Agency has properly pleaded its case by pleading the four statutory elements for liability under TSCA section 8(e). Specifically, EPA, in the Complaint, alleges:

- (1) Respondent is a person who manufactures, processes or distributes in commerce a chemical substance or mixture as those terms are defined in TSCA sections 3 and 8(f) (Compl. ¶¶ 2, 4-12);
- (2) Respondent obtained information (Compl. ¶¶ 41-42);
- (3) the information obtained by Respondent reasonably supports the conclusion that hexavalent chromium exposure presents a substantial risk of injury to the health of certain workers in modern chromium production facilities utilizing low-lime or no-lime manufacturing processes (Compl. ¶¶ 43-48); and
- (4) Respondent failed to immediately inform the Administrator of the information (Compl. ¶ 49).

Therefore, EPA’s Complaint pleads all of the requisite statutory elements and states a claim upon which relief may be granted.